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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 489

CHARLES I. DAWSON, Attorney General of the State of Kentucky, VICTOR A. BRADLEY, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, *Appellants,*

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED, , 1920

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SUPREME COURT OF THE UNITED STATES

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No.

CHARLES I. DAWSON, Attorney General of the State of Kentucky, VICTOR A. BRADLEY, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, *Appellants,*

VERSUS

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

TRANSCRIPT OF RECORD.

PROCEEDINGS of the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Frankfort, on Monday, September 22, 1919.

PRESENT: HON. A. C. DENISON, Circuit Judge.
HON. WALTER EVANS,
HON. A. M. J. COCHRAN, District Judges.

BE IT REMEMBERED that heretofore, to-wit: on May 14, 1920, came the plaintiff herein by Wm. Marshall Bullitt, Esq., its Counsel, and filed in the Clerk's office in our said Court, its Bill in Equity, which is in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 937.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - - - - *Plaintiff,*

vs.

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

BILL IN EQUITY.

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Kentucky at Frankfort:

The plaintiff, Kentucky Distilleries and Warehouse Company, states as follows, to-wit:

1. The KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY (hereinafter called the KENTUCKY COMPANY) is a corporation created and organized on, and existing since, February 3, 1899, under the laws of the State of New Jersey, with power to engage in, and, since February 3, 1899, it has (in Kentucky, Illinois, Rhode Island, Connecticut, New Jersey, and in the several other States of the United States) been engaged in, the business of (*a*) distilling, manufacturing, storing, distributing, buying and selling and transporting to and from Kentucky, from and to, the other States both under bond and otherwise, whiskey, alcohol, high wines, and other distilled spirits for beverage purposes up to January 16, 1920, and for non-beverage purposes up to the present time, and (*b*) owning, operating and maintaining a large number of registered distilleries, bonded warehouses, bottling plants, distributing agencies, and other properties necessary for the conduct of its business throughout the United States, and it is a citizen of the State of New Jersey.

CHARLES I. DAWSON, a defendant to this Bill, is the Attorney-General of the State of Kentucky, is a citizen of the State of Kentucky, and is an inhabitant of the Eastern District thereof at Frankfort.

VICTOR A. BRADLEY, a defendant to this Bill, is the Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, is a citizen of the State of Kentucky and is an inhabitant of the Eastern District thereof at Georgetown.

JOHN J. CRAIG, a defendant to this Bill, is the Auditor of Public Accounts for the State of Ken-

tucky, is a citizen of the State of Kentucky, and is an inhabitant of the Eastern District thereof at Frankfort.

These three defendants are by law charged with the duty of enforcing, and they threaten to, enforce the terms and provisions of the hereinafter mentioned Act of March 12, 1920, within the State of Kentucky, wherein the plaintiff does and carries on a large part of its business.

2. This is a suit of a civil nature, in equity, between citizens of different States; the matter in controversy exceeds in value the sum of Three Thousand ($3,000.00) Dollars exclusive of interest and costs; it is between citizens of different States; it arises under the Constitution and laws of the United States, and particularly under (1) Article I, Section 8, Clause 3 of the Constitution wherein Congress is given power to regulate commerce with foreign nations and among the several States, and (2) the Fourteenth and Eighteenth Amendments to the Constitution, the Internal Revenue Laws of the United States, and Title II of an Act of Congress passed October 28, 1919, entitled *"An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries"* (hereinafter called the National Prohibition Act); and this is a suit to restrain the defendants from enforcing against the plaintiff the

pains and penalties provided for in Section 5 of an Act of the General Assembly of the State of Kentucky, approved March 12, 1920, entitled "*An Act imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this act, and declaring an emergency to exist*" (hereinafter called the "50 Cent a gallon Tax Act").

3. The KENTUCKY COMPANY is now, and for more than five years last past has been the owner, either in its own name or in that of Julius Kessler & Company (which is a subsidiary branch of and is entirely owned by the KENTUCKY COMPANY), of more than,

(*a*) 5,000 barrels of whiskey, containing according to the original official gauge about 250,-

000 proof gallons; of that 5,000 barrels about 2,500 barrels contain about 125,000 proof gallons according to the original official gauge, and were manufactured by the plaintiff more than to-wit: five years ago, and were then, and always have been and are now, owned, and were originally entered into by and are now, in U. S. bonded warehouses in the name of the plaintiff; the remaining 2,500 barrels of whiskey contain about 125,000 proof gallons, according to the original official gauge, and were manufactured by plaintiff's said branch more than to-wit: five years ago, and were then, and always have been and are now, owned and were originally entered into by and now are in U. S. bonded warehouses in the name of said Julius Kessler & Company; the actual cost and value to the plaintiff of said first above named 2,500 barrels of whiskey was at the time of its said manufacture more than to-wit: five years ago, and continuously since said date has been, in excess of to-wit: $100,000, and the actual cost and value of said second mentioned 2,500 barrels of whiskey was, at the time of its said manufacture more than to-wit: five years ago, and since has been, in excess of to-wit $100,000; the actual value of all said whiskey is now in excess of $200,000; the said 5,000 barrels of whiskey were originally and now are stored in said bonded warehouses, in the States of Kentucky, Illinois, Missouri and New Jersey, but by far the greater portion is in Kentucky.

(*b*) About 32,000 cases of whiskey in bottled-in-bond form, each case containing 3 gallons, of which about 2000 cases, of the value of over $40,000 are owned by the Kentucky Company, and about 30,000 cases of the value of over $600,000 are owned by the Kentucky Company in the name of said Julius Kessler & Company; and all are and since their manufacture over, to-wit, five years ago, have been in various U. S. bonded warehouses in Kentucky.

4 There are now in the United States bonded warehouses that are owned by the KENTUCKY COMPANY about 167,000 barrels of whiskey all manufactured by the KENTUCKY COMPANY over to-wit: five years ago, of which there are:

(*a*) In its bonded warehouses located in Kentucky about 160,000 barrels of whiskey, containing, to-wit: 8,000,000 proof gallons, according to the original official gauge, and

(*b*) In its bonded warehouses located in Peoria, Illinois, about 4,000 barrels of whiskey, containing, to-wit: 200,000 proof gallons, according to the original official gauge.

The actual cost and value of said whiskey, described in paragraphs (*a*) and (*b*) above, was and is far in excess of $5,000,000; all of said whiskey belongs to thousands of individuals, firms, banks and corporations, all or nearly all of whom are residents and citizens of the United States; the owners thereof purchased the same in various quantities at different times principally during each of the five years prior to December 18, 1917 and they hold the KENTUCKY COMPANY'S warehouse receipts which were duly issued by it at said times in the regular course of its business, and by and with the consent and approval of the Internal Revenue Department and officials of the United States and duly and legally represent said whiskey; the said warehouse receipts are negotiable instruments, are and always have been dealt in and handled as such and pass by endorsement and delivery and the names of said thousands of owners and holders thereof are unknown to and

can not be ascertained by the KENTUCKY COMPANY.

The owners of such warehouse receipts are looking to the KENTUCKY COMPANY as warehouseman, and are insisting that it shall perform the duties of a warehouseman with reference thereto.

From day to day the holders of such receipts are demanding that the KENTUCKY COMPANY ship, under bond, large quantities of whiskey from Kentucky to other States, and it is so shipping such whiskey.

5. The KENTUCKY COMPANY is, and for twenty years last past has been, the owner of said warehouses, in which the aforesaid whiskey is stored, but the warehouses are by law bonded to the United States, and such of said warehouses as are in Kentucky are in the possession of and under the direction and control of the Collector of Internal Revenue in said State.

The KENTUCKY COMPANY has employed, and still employs, a large number of officers, salesmen and agents, and has been doing an annual business of many thousands of dollars.

In the course of its business its whiskey must be transported under bond pursuant to the laws of the United States providing for such transportation from one place to another within the same State and from one State to another State in quantities of one barrel or more of bulk goods, or of one case or more of case goods, and this requires many separate transactions.

6. On March 12, 1920, there was enacted by the General Assembly of the Commonwealth of Ken-

tucky, and approved by the Governor of Kentucky, the said "50 Cent a gallon Tax Act" which, among other things, provides in substance as follows, to-wit:

1. That every corporation engaged, as is the KENTUCKY COMPANY, in owning and storing whiskey in bonded warehouses and in removing such whiskey therefrom,

> "shall pay an annual license tax to the Commonwealth of Kentucky of 50c on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

2. That every corporation owning or operating a bonded warehouse in Kentucky where whiskey is stored, as does the KENTUCKY Co., shall (1) on or before June 1st, 1920, file a report with the defendant Craig, as Auditor of Public Accounts, showing the number of proof gallons of whiskey withdrawn from bond since March 12, 1920, and (2) monthly thereafter file a similar report showing the number of such gallons so withdrawn since the date of making the last preceding report, and also the number of proof gallons transported under bond out of the State of Kentucky.

3. That every corporation owning or controlling a bonded warehouse, as the KENTUCKY Co. does, shall at the time of making the reports above mentioned, pay to the defendant, Craig, as Auditor of Public Accounts, a

> "tax of 50c per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report";

and that to secure the payment of such tax the Commonwealth of Kentucky shall have a lien on all whis-

key stored in the warehouse together with the other property of the warehouseman used in connection therewith.

4. That every corporation failing to make the reports above mentioned and failing to pay the taxes therein provided for

> "shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $500, nor more than $1000, and each day after the date such report is due that such person, corporation, association or partnership is in default, shall be treated and considered as a separate offense."

A copy of such act is filed herewith as part hereof, marked "Exhibit 1."

7. Since March 12, 1920, the KENTUCKY COMPANY has taxpaid and withdrawn from bond, 86986 proof gallons of whiskey, and has transported under bond from its bonded warehouses in Kentucky, to other bonded warehouses outside of Kentucky, 7870 proof gallons of whiskey.

8. The defendants, John J. Craig, Auditor of Public Accounts, and Charles I. Dawson, Attorney General of the State of Kentucky, and Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky are, by law charged with the duty of enforcing, and are preparing to enforce actively on June 1, 1920, all of the provisions of said "50c a gallon Tax Act."

They insist that the KENTUCKY Co. shall file the reports therein called for, and shall pay the 50c a gallon tax above mentioned; and they, and each of them, are threatening to bring numerous criminal

prosecutions against all persons, including the KENTUCKY COMPANY, its officers, agents and employes, who shall fail to make the reports and to pay the taxes provided for in said Act; and, unless restrained, they will, by indictment or penal actions, seek to have imposed upon the KENTUCKY Co., its officers, agents and employes, a fine of not less than $500, nor more than $1000 for each day in which the KENTUCKY COMPANY is in default in not filing such reports or paying said taxes.

9. The "50c a gallon Tax Act" provides that in order to secure the payment of the tax above mentioned, the Commonwealth of Kentucky shall have a lien on (*a*) all the spirits stored in such bonded warehouses, and (*b*) the other property of the bonded warehouseman used in connection therewith.

The defendants will, in the event that the KENTUCKY COMPANY shall not file the report and pay the tax provided for in said Act, assert a lien against all of the thousands of barrels of other whiskey stored in the KENTUCKY COMPANY'S various bonded warehouses in Kentucky and upon the real estate and the improvements thereon owned by the KENTUCKY Co. and constituting its warehouses. Such an action will create a cloud upon the title of the KENTUCKY COMPANY'S property.

10. The "50c a gallon Tax Act" is unconstitutional and void for the following reasons:

(*a*) So much thereof as imposes a tax of 50 cents upon each proof gallon of whiskey transported in

bond out of Kentucky into another State is a tax or burden upon Interstate Commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States which gives Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

(*b*) By reason of the invalidity of so much of said Act as imposes a tax upon whiskey transported out of Kentucky into other States, the entire Act is invalid.

(*c*) The "50c a gallon Tax Act" is in violation of Section 171 of the Constitution of the State of Kentucky in that the tax is not uniform but imposes double taxation upon whiskey, a burden that is not imposed upon any other property in the State of Kentucky.

(*d*) The Act is not authorized by, but is in violation of Sections 171 and 181 A of the Constitution of the State of Kentucky in that the General Assembly was not authorized to provide for a license fee or tax on whiskey withdrawn from bond or transported out of Kentucky.

(*e*) The National Prohibition Act passed October 28, 1919, pursuant to the Eighteenth Amendment of the Constitution of the United States provides in Title II thereof the terms and conditions on which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another; and the said "50c a gallon Tax Act" is in conflict with the said Act of Congress.

WHEREFORE the plaintiff, KENTUCKY DISTILLERIES & WAREHOUSE COMPANY prays as follows, to-wit:

1. That the said "50c a gallon Tax Act" and especially so much thereof as imposes a tax upon whiskey transported in bond from Kentucky to another State, be declared unconstitutional and void.

2. That the defendants and each of them be enjoined and restrained from in any manner enforcing or attempting to enforce against the Kentucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, the penalties prescribed in and by Section 5 of said "50c a gallon Tax Act," and from indicting, prosecuting or attempting to indict or prosecute the Kentucky Distilleries & Warehouse Company, its officers, agents or employes or any of them for or on account of any failure to file the reports or pay the taxes provided for in said Act; and from in any manner enforcing or attempting to enforce any lien upon the whiskey or the bonded warehouses of the Kentucky Distilleries & Warehouse Company for the purpose of enforcing collection of said tax.

3. That a temporary injunction or other appropriate relief as above prayed, be granted, temporarily restraining the defendants and each of them pending the final hearing of this cause, from in any manner enforcing or attempting to enforce against the plaintiff, its officers, agents, or employes, or any of them, the penalties prescribed by Section 5 of said "50c a gallon Tax Act."

4. For such other and further relief as may be meet and proper in the premises.

MAY IT PLEASE YOUR HONORS, to grant unto the plaintiff a writ of subpoena, to be directed to the said Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts for the State of Kentucky, the defendants hereinbefore named, commanding and requiring them and each of them to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this bill contained.

LEVY MAYER,
BRUCE & BULLITT,
Counsel for Plaintiff.

J. P. HANLEY, being first duly sworn, deposes and says that he is the Assistant Secretary of the plaintiff, Kentucky Distilleries & Warehouse Company; that he is the chief officer or agent in this State; that he has read the foregoing Bill in Equity, and that the statements therein contained are true.

J. P. HANLEY.

Subscribed and sworn to before me this 13th day of May, 1920.

M. L. WIEST,
Notary Public, Jefferson Co., Ky.
My commission expires March 25, 1922.

EXHIBIT—Filed May 14, 1920, J. W. Menzies, U. S. Clerk.

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this act, and declaring an emergency to exist."

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. Every **corporation**, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits **so manufactured or stored in a bonded warehouse**, or withdrawn **from a bonded warehouse, or transferred therefrom under bond** out of the Commonwealth of Kentucky.

§2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the 1st day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total

amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

§3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits **removed** from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, **or transferred under bond out of this state**, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or

transferred under bond, and shall be subrogated to the lien of the Commonwealth.

§4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

§5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association of partnership is in default shall be treated and considered as a separate offense.

§6. The tax herein provided for, when collected, shall be distributed as follows: To the state road fund, sixty-five per cent thereof; to the general expenditure fund, thirty-five per cent thereof.

§7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed

by law on persons, corporations, partnerships or associations engaged in business covered by this act; and all acts in conflict therewith are hereby repealed, and especially there is hereby repealed chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

§8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 937.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs.

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

MOTION FOR AN INTERLOCUTORY INJUNCTION.

The plaintiff, Kentucky Distilleries & Warehouse Company moves the Court to grant a writ of injunction against the defendants, Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky and each of them pending this suit and until further order of this Court conformable to the prayer of the Bill in Equity in the above styled case filed, and particularly enjoining and restraining them, and each of them, from in any manner enforcing or attempting to enforce against the Ken-

tucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, the penalties prescribed in and by Section 5 of an Act of the General Assembly of the State of Kentucky approved March 12, 1920, called herein the "50c a gallon Tax Act," and from indicting, prosecuting, or attempting to indict or prosecute the Kentucky Distilleries & Warehouse Company, its officers, agents or employes, or any of them, for or on account of any failure by it or by them, to file the reports, or to pay the taxes provided for in the said Act, and from in any manner enforcing or attempting to enforce any lien upon the whiskey or the bonded warehouses of the Kentucky Distilleries & Warehouse Company, for the purpose of enforcing the collection of said taxes provided for in said Act.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - - - - *Plaintiff,*

vs.

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

MOTION.

The defendants herein move that the Court dismiss the bill of plaintiff, for the reason that same does not state facts sufficient to support a cause of action against them, or any of them.

CHAS. I. DAWSON,
Attorney General.

IN THE DISTRICT COURT OF THE UNITED STATES EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs.

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

MOTION.

The defendants herein move the Court to dismiss plaintiff's bill, because of lack of equity therein, and because the plaintiff has a full, complete and adequate remedy at law.

CHAS. I. DAWSON,
Attorney General.

IN THE DISTRICT COURT OF THE UNITED STATES EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - - - - *Plaintiff,*

vs.

CHARLES I. DAWSON, Attorney General of the State of Kentucky,

VICTOR A. BRADLEY, Commonwealth's Attorney for the 14th Judicial District of the State of Kentucky, and

JOHN J. CRAIG, Auditor of Public Accounts of the State of Kentucky, - *Defendants.*

MOTION.

Defendants, Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney Fourteenth Judicial District of the State of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky, represent to the Court that there is now pending in the Franklin Circuit Court of Franklin County, Kentucky, a suit, wherein S. Rosenbloom & Company are the plaintiffs and E. H. Taylor, Jr., & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are parties defendant; that said suit involves the validity of the Act of the General Assembly of the Commonwealth

of Kentucky, approved March 12, 1920, referred to and embodied in the petition of the plaintiffs in this case. They represent to the Court that said Franklin Circuit Court is a Court of original and general jurisdiction, and has jurisdiction both of the subject matter involved in said suit and of the person of these defendants, and of their co-defendant, E. H. Taylor, Jr., & Sons, and the said Court has jurisdiction under the laws of the Commonwealth of Kentucky to enforce the act attacked in the said proceeding and attacked in the proceeding in this case.

They state that there has been issued and served upon them in the case pending in the Franklin Circuit Court, above referred to, a temporary restraining order issued by the Clerk of the Franklin Circuit Court, enjoining and restraining these defendants and each of them from enforcing said act or its penalties, by suit or indictment or otherwise, until further orders of the Court. They state that it is their purpose to press to a final conclusion the litigation now pending in the Franklin Circuit Court as speedily as can be done, and they say that by virtue of the said proceeding now pending in the Franklin Circuit Court, as above set out, under the provisions of Section 266 of the Judicial Code, proceedings in this Court should be stayed until the final determination of the said suit now pending in the Franklin Circuit Court.

They file in support of their motion a certified copy of the record of the suit now pending in the said Franklin Circuit Court.

WHEREFORE, they move the Court that it stay proceedings herein until the final determination of the suit now pending in the State Court aforesaid.

CHAS. I. DAWSON,
Attorney General.

EXHIBIT IN CASE KY. DIST. & W. H. CO. vs. CHAS. I. DAWSON, Atty. Gen. Ky., ET AL., No. 937
—Filed June 4, 1920.

Filed with Defendants' Motion for a Stay of Proceedings.

FRANKLIN CIRCUIT COURT.

Sol Rosenbloom, trading as S. Rosenbloom & Company, - - - - - - - - Plaintiffs,

vs. PETITION IN EQUITY.

E. H. Taylor, Jr. & Sons (Inc.), - - - Defendant.

The plaintiff says that he is a wholesale liquor dealer located at Pittsburgh, Penna., and a resident there trading and doing business under the name of S. Rosenbloom & Co., and in 1917 became the owner of several hundred barrels of distilled spirits—whiskey—by purchase from the defendant, E. H. Taylor, Jr. & Sons, a corporation organized under the laws of the State of Kentucky, and engaged in the manufacture of distilled spirits, to-wit: whiskey, and having its Home Office at Frankfort, in Franklin County, Kentucky, with its distilling plant and warehouses situated in Woodford County, near Frankfort, Kentucky.

The plaintiff says that the warehouse certificates for said whiskey were delivered to him at the time of the

purchase, but that the whiskey itself remained in the afore-mentioned warehouses. He says that about December, 1919, desiring to have certain of their said whiskey bottled in bond for export, to-wit: some two thousand (2,000) cases, they delivered to the defendant, warehouse receipts to cover that quantity of the barrel goods aforesaid, and after complying with all the regulations of the United States Revenue Laws affecting the removal and transfer of said goods in bulk under bond to another warehouse on the distillery premises, for bottling purposes, he caused the defendant to make such removal and upon such removal and transfer, to report to the Auditor of Public Accounts and pay into the Treasury of the Commonwealth of Kentucky, through said Auditor, the license tax of Two (2c) Cents on every proof gallon of said distilled spirits as was liable for taxation by the Federal Government, the quantity thereof being fixed and measured by the State Tax Commission. That said report and payment are shown in the report made in January, 1920.

The plaintiff says that while said whiskey was bottled in bond at a time when it could have been exported for beverage purposes, transportation could not be obtained in time for the shipment prior to January 16th, 1920, but said whiskey is yet entitled to be exported or used domestically for medicinal purposes.

That they have complied with all the government regulations concerning their right to sell and dispose of said whiskey, and with the necessary permits to do so, they have sold same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to the purchaser.

The plaintiffs say that for the purpose of having said bottled in bond goods shipped to the purchaser, they did on March 22nd, 1920, demand of the defendant the immediate possession of said two thousand (2,200) cases of whiskey and made preparations to load same on the cars at Taylorton, the railway station at the plant of the defendant, and had workmen at hand ready to engage in the work of loading same into cars procured for said purpose. That the defendant without right interfered with the work of its agents and servants in preparing to

ship said goods and did so on the sole ground that a license tax of Fifty (50c) Cents on the gallon had been imposed on the whiskey of the plaintiffs by an Act of the General Assembly entitled

> "AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purposes of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist."

And which Act was approved on March 16th, 1920, and became effective on that date, and for which tax the defendant claims it would be liable in the event said whiskey was subject to said tax.

That the defendant has refused to permit the plaintiffs, or their agents and servants, to load said whiskey on the cars prepared for its shipment as aforesaid, unless and until the plaintiffs should pay said tax or agree to reimburse it for its payment of same. And so the defendant continues to interfere with and prevent their agents and servants from doing said work.

The plaintiffs further charge that the bottled in bond whiskey named, having been transferred and removed once from the warehouse and the license tax of Two (2c) Cents per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16th, 1920, to the Fifty cent per gallon tax.

The plaintiffs say that the defendant is holding their whiskey without right and that they do not owe any further tax on the cases named.

They state that unless the defendant be enjoined and restrained from any further interfering with and preventing their agents and servants in the work of loading the plaintiff's whiskey on the cars, and preventing its delivery for shipment to the purchaser thereof, they will suffer great and irreparable injury, that no injunction herein has been applied for or refused by the Court or any Circuit Judge. He files herewith a copy of the Act of 1920, same not yet having appeared in printed form.

WHEREFORE, the plaintiffs pray that the defendant be enjoined from interfering with the plaintiffs, or his agents and servants in their work of taking possession of the two thousand (2,000) cases involved and loading same for shipment, and from further refusing the demand of the plaintiffs for the actual delivery of said whiskey to the plaintiffs, for a mandatory order to defendant to deliver said cases to the plaintiffs, and for all proper and appropriate relief.

Hazelrigg & Hazelrigg
Attys. for plaintiff.

IN HOUSE
REGULAR SESSION, 1920

HOUSE BILL No. 513
THURSDAY, FEBRUARY 26, 1920.

Mr. Vance introduced the following bill, which was ordered to be printed and referred to the Committee on Revenue and Taxation, viz:

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this

state, and in removing same therefrom for the purpose of sale or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whiskey or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly report to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such persons, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or

partnership operating, owning or controlling such bonded warehouse, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits known as whiskey or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a

lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships, or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereof, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor."

Thereupon on the 26th day of March, 1920, the clerk issued the following summons:

EQUITY SUMMONS

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County, Greeting:

You are commanded to summon E. H. Taylor, Jr. & Sons (Inc.), to answer in 10 days after the service of the summons, a petition in Equity filed against them in the Franklin Circuit Court by S. Rosenbloom & Company, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, KELLY C. SMITHER, Clerk of said Court, this 26th day of March, 1920.

Kelly C. Smither, Clerk
By Bertha Moore, D. C.

The sheriff's return on the foregoing summons is in words and figures as follows:

Executed on E. H. Taylor, Jr. and Sons, by delivering to J. Swigert Taylor, Vice-President of said company, a true copy hereof. March 26, 1920.

G. Bain Moore, S. F. C.
By N. A. Sullivan, D. S.

On the 7th day of May, 1920, the following answer was filed:

S. Rosenbloom & Company, - - - - - - Plaintiffs,

vs. ANSWER.

E. H. Taylor, Jr. & Sons (Inc.), - - - Defendants.

The defendant, E. H. Taylor, Jr. & Sons (Inc.) for its answer herein admits that it is a corporation organized under the laws of Kentucky, and at all the times mentioned in the petition was engaged in the business of manufacturing distilled spirits known as whiskey, with distilling plant and warehouses situated in Woodford County, Ky., and home office at Frankfort, Ky. The defendant further admits that the plaintiffs in 1917 were the owners of several hundred barrels of whiskey purchased by it of the defendant, and which were stored in bulk in barrels in the warehouses of the defendant, warehouse certificates for which were issued and delivered to the plaintiffs.

That on October 14th, 1919, the defendant received directions from the plaintiff to bottle in bond for them one hundred and eighty (185) barrels and one hundred (100) barrels of their said whiskey, designating the serial numbers thereof, for the purpose of exporting same from the United States, and directed the defendant to pay all the taxes due thereon, State and County and the special tax of two (2c) cents on the gallon thereof, and thereupon the defendant transferred said barrels of whiskey under bond, or removed them into the bottled in bond warehouse in order to bottle same in bond, and as directed, paid the County and State taxes thereon for the plaintiff including the sum due the State for the two-cent tax, amounting to $148.68, being the special tax on the 185 barrels, and the sum of $79.12, being the said two cents on the gallon, special tax, on the 100 barrels, and which sums were paid to the State of Kentucky, as shown on its January 1st, 1920, report to the Auditor of

Public Accounts, together with other payments of a like character. It files herewith a statement of the transactions with respect to the 185 and 100 barrels, and which include the cases named in the petition as ordered for medicinal purposes, and of the detention of which complaint is made in the petition.

That for further answer, it denies that the plaintiff is entitled to the immediate possession of the two thousand (2,000) cases named in its petition.

That under the Act of the General Assembly approved March 16th, 1920, and entitled as set out in plaintiff's petition, a copy of which is filed therewith, a tax of fifty (50c) cents on each proof gallon is levied on each owner of such whiskies, engaged in the business of owning and storing such spirits in bonded Warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, and that the plaintiff is so engaged and his said two thousand (2,000) cases so stored as set out in his petition, and same are apparently liable to the said fifty-cent tax, and for which tax the defendant, as warehouseman, is also liable if it permits a removal thereof unless said spirits are tax paid. And for this reason defendant admits it is interfering and preventing such removal as set out in the petition.

The defendant is informed that aside from the question of construction of the Act, that there may be a question as to the validity of said tax, and to protect itself as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some Court of competent jurisdiction.

WHEREFORE, it prays to be dismissed with its costs and for all proper relief.

C. C. Turner,
Attorney for defendant.

The following exhibits were filed with the foregoing answer:

OLD TAYLOR—Yellow Label Registered in U. S. Patent Office Number 53339

E. H. TAYLOR JR. & SONS
Incorporated

Frankfort, Ky. Oct. 14, 1919

Pay to the order of HENRY F. LINDSEY, ESQ., Cashier $1758.50 One Thousand Seven Hundred Fifty Eight and 50/100 Dollars

To S. Rosenbloom & Co.
Pittsburgh, Pa.

E. H. TAYLOR JR. & SONS
Incorporated
By J. S. Taylor, C. President.

Copy of Draft
on Rosenbloom & Co.
Copy Attest
J. H. Lutkemeier

Folio———— Statement

Frankfort, Ky. April 14, 1919.

Messrs. S. Rosenbloom & Co.,
Pittsburgh, Pa.

In account with
E. H. TAYLOR JR. & SONS
Incorporated

DISTILLERS.

Charges	1141.13	
do	636.45	1777.58
Credit		
Excess allowance	9.18	
" "	9.90	19.08
Draft this day		1758.50

E. H. TAYLOR JR. & SONS
Incorporated

DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

In account with Messrs. S. Rosenbloom & Co.

Order No. 10-34 Pittsburgh, Pa.

Tax &c. on 185 Bbls. Feby. & Mch. 1915 "Old Taylor"
Serial Nos. 174842/56, 175842/46, 175672/86,
176742/86

7433.9 tax galls. @

State and County Texas		179.41
135-56		378.00
Months' Storage @ 5c per bbl.		
50-55 per mo.		137.50
Special State Tax 7433.9 galls. @ 2c		148.68
Hauling and Handling Excess 43.6		279.04
Ex Stamps		18.50
		1141.13

We make draft Excess 9.18

For $, which please honor

Bill of Lading Will Follow

Warehouse Receipt for Barrels, Serials

, Herewith Eclosed.

Copy Attest:
J. H. Lutkemeier

CREDIT MEMORANDUM

E. H. TAYLOR JR. & SONS
Incorporated

DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

Messrs. S. Rosenbloom & Co.,
Pittsburgh, Pa.

We have credited your account for EXCESS on 185 barrels 1915 "TAYLOR" Whiskey

174842	174856
175832	175846

Serials 175672 to 175686 as follows, viz:

176742	176786
176787	176831
177077	177126

5.1 proof gallons at $	$4.57
5.1 tax gallons at $1.10	5.61
	$9.18

This amount will be deducted from Draft

Copy Attest
J. H. Lutkemeier

E. H. TAYLOR JR. & SONS
Incorporated

DISTILLERS.

Frankfort, Ky., Oct. 14, 1919

In account with Messrs. S. Rosenbloom & Co.,
Pittsburgh, Pa.

Order No. 10-34

Tax &c. on 100 Bbls. Mch. 1915 "Old Taylor"
Serial Nos. 177127/76, 177177/186, 177302/41
3956.0 tax galls @

	State and County Taxes	96.97	
55	Months' Storage, @ 5c per bbl. per mo.	275.00	
	Special State Tax 3956.0 galls @ 2c	79.12	
	Excess 27.4	175.36	
	Export Stamps	10.00	
	Excess 9.90		636.45

We Make Draft
For $, which Please Honor
Bill of Lading Will Follow
Warehouse Receipt for Barrels, Serials
, Herewith Enclosed.

Copy Attest:
J. H. Lutkemeier.

CREDIT MEMORANDUM

E. H. TAYLOR JR. & SONS
Incorporated

DISTILLERS.

Frankfort, Ky. Oct. 14, 1919.

M. S. Rosenbloom & Co.,
Pittsburgh, Pa.

We have credited your account for EXCESS on 100 barrels 1915 "TAYLOR" Whiskey

Serials 177127 177176 / 177177 to 177186, as follows, viz: / 177302 177341

5.5 proof gallons at $ .70	$3.85
5.5 tax gallons at $1.10	6.05
	$9.90

This acount will be deducted from Draft

Copy Attest
J. H. Lutkemeier

On the 7th day of May, 1920, the following reply and cross-petition was filed:

S. Rosenbloom & Company, Plaintiffs,

vs. REPLY AND CROSS-PETITION.

E. H. Taylor, Jr. & Sons, Defendants.

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1. For reply the plaintiff denies that the two thousand cases of whiskey herein are liable to the said fifty-cent tax, and for which tax the defendant, E. H. Taylor,

Jr. & Sons, is liable if it permits a removal thereof unless said spirits are tax paid.

2. The plaintiff admits that the whiskey involved herein is under the terms of the Act mentioned and set out by the defendant in its answer, apparently liable to the fifty-cent tax imposed by that Act, but the plaintiff says the said Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled

> "AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist."

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of Legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172

thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states and who are competitors with plaintiff in the business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky, and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr. & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act.

That Honorable Chas. I. Dawson is the Attorney General of the Commonwealth of Kentucky, and the head of its legal department, and charged with the

duty of enforcing said Act of March 16, 1920, and is threatening to enforce same, and the penalties therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and Charles I. Dawson, Attorney General, are the proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued against them, and they are now made such parties and process is asked against them. That the Hon'l. Robert. L. Stout is now absent from this county and that no injunction herein against the prosecution of this action has been refused by the Court or other Circuit Judge.

The plaintiff says that unless the defendants, Chas. I. Dawson, Attorney General, and John J. Craig, the defendants, are made parties hereto, and are immediately enjoined and restrained from enforcing said Act of March 16, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr. & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury, and especially so from the delay in giving notice of this application and plaintiff has no remedy at law available to him to prevent said injury and wrong.

WHEREFORE, the plaintiff prays that Chas. I. Dawson, Attorney General, and the said John J. Craig, Auditor, aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cents per gallon tax thereon, and from enforcing the provisions of the Act of March 16, 1920, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

Hazelrigg & Hazelrigg
For plaintiffs.

STATE OF KENTUCKY }
COUNTY OF FRANKLIN } Set:

Affiant, J. H. Hazelrigg, says that he is the attorney of plaintiff, S. Rosenbloom & Company, who is absent from this county and that the statements of the foregoing reply and cross-petition are true.

J. H. Hazelrigg.

Subscribed and sworn to before me by J. H. Hazelrigg, this 8th day of May, 1920.

Kelley C. Smither
C. F. C. C.

At a court held on the 8th day of May, 1920, the following order was entered:

S. Rosenbloom & Co., - - - - - - - - - Plaintiff,

vs.

E. H. Taylor, Jr. & Sons, &c., - - - - - Defendants.

Came plaintiff by attorney and filed amended petition.

The amended petition referred to in the foregoing order is in words and figures as follows:

S. Rosenbloom & Company, - - - - - - Plaintiffs,

vs. AMENDED PETITION.

E. H. Taylor, Jr. & Sons (Inc.) &c., - - Defendants.

The plaintiff for amendment to his original petition, says that the Act of the General Assembly of Kentucky, approved March 16th, 1920, and entitled:

"AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the business covered by this Act; and declaring an emergency to exist,"

is unconstitutional and an illegal and unlawful exaction and unlawful exercise of legislative power.

That it is a revenue measure purely though raised by a license tax and is confiscatory in its character and sense, and imposes a tax wholly out of proportion to the value of the license conferred and of the article taxed, and said exaction is beyond the limits of any reasonable profit derivable from the manufacture and sale of the article taxed, or the cost of regulation and licensing such manufacture and sale. That the basic commercial value of whiskey generally is about One Dollar per gallon.

That said Act violates the constitution of the State of Kentucky, and particularly Sections 171 and 172, thereof requiring uniformity of taxation within the territorial limits of the authority imposing the tax.

That said tax is discriminatory in its nature and adds a greater burden on whiskey than on other personal property, and property of like value, and on business and occupations of equal and like character and value, and no such confiscatory and discriminatory tax is imposed on owners or holders of similar property in other states

and who are competitors with plaintiff in this business named.

That an enforcement of said Act will result in taking private property for public purposes without just compensation and without due process of law, and deprives the owners of such property and warehousemen in charge thereof the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States.

That the defendant, John J. Craig, is the Auditor of Public Accounts in and for the Commonwealth of Kentucky, and is charged with the duty of requiring the reports provided for under said Act, and further charged on behalf of the State with the collection of said tax, and is threatening to and is about to collect same by requiring said reports and subjecting the plaintiff to indictment and heavy fines and penalties for failing to report and pay said tax as provided in said Act, and is threatening to institute civil actions as well to require said reports and enforce said collection, and said Craig has demanded of the plaintiff, as well as of the defendant, the payment of said tax on the whiskey in question, and which tax the plaintiff admits the defendant, E. H. Taylor, Jr. & Sons, is likewise liable for under the terms of said Act. That the said defendant, Craig, as Auditor, has warned the plaintiff, and presumably the defendant, that if said whiskey is removed from the warehouse where it is now stored they will be proceeded against forthwith for the collection of said tax, and the enforcement of the penalties imposed by the Act. That Honorable Charles I. Dawson is the Attorney-General of the Commonwealth of Kentucky, and the head of its legal department and charged with the duty of enforcing said Act of March 16th, 1920, and is threatening to enforce same and the penalties therein provided by civil actions and by indictments and other criminal proceedings, therein provided, and will do so unless enjoined.

The plaintiff charges that the defendants, John J. Craig, as Auditor aforesaid, and defendant, Charles I. Dawson, Attorney-General, are proper and necessary parties hereto, and this Court is asked that they be made such parties and that process of this Court be issued

against them, and they are now made such parties and process is asked against them. That the Honorable Robert L. Stout, Circuit Judge of this County, is now absent from this county and that no injunction herein against the prosecution of this action has been refused by this court or other Circuit Judge.

The plaintiff says that unless the defendants, Charles I. Dawson, Attorney-General, and John J. Craig, Auditor, are made parties hereto, and are enjoined and immediately restrained from enforcing said Act of March 16th, 1920, and from requiring the plaintiff and the defendant, E. H. Taylor, Jr. & Sons, from reporting and paying the taxes on said whiskey the plaintiff will suffer great and irreparable injury and especially so from the delay arising in giving notice of this application, and plaintiff has no remedy at law available to him to prevent said injury and wrong.,

WHEREFORE, the plaintiff prays that Charles I. Dawson, Attorney-General, and said John J. Craig, Auditor aforesaid, be made parties defendants hereto on behalf of the Commonwealth of Kentucky, and that said cross-defendants be enjoined and restrained from requiring said reports of said whiskey to be made and from collecting the said fifty-cent per gallon tax thereon, and from enforcing the provisions of the Act of March 16th, 1920, or its penalties by civil actions or by indictments or otherwise, and that the plaintiff be allowed to remove his whiskey without the payment of said tax and that said Act of March 16th, 1920, be held to be invalid and unconstitutional, and for judgment for costs and all proper relief.

Hazelrigg & Hazelrigg
For plaintiff.

State of Kentucky }
Franklin County } Set:

Affiant, J. H. Hazelrigg, says that he is the attorney for plaintiff, S. Rosenbloom & Company, who is absent from the county and that the statements of the foregoing amended petition are true. J. H. Hazelrigg.

Subscribed and sworn to before me by J. H. Hazelrigg this———day of May, 1920.

On the 12th day of May, 1918, the following summons was issued by the clerk:

EQUITY SUMMONS

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County, Greeting:

You are commanded to summon John J. Craig, Auditor Public Accounts for the State of Kentucky, and Charles I. Dawson, Attorney General of the State of Kentucky, to answer in 10 days after the service of the summons, reply and cross-pet. and an amended petition in Equity filed against them in the Franklin Circuit Court by S. Rosenbloom & Co. and warn them that upon failure to answer, the reply and cross-petition and amended petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, KELLY C. SMITHER, Clerk of said Court, this 12th day of May, 1920.

Kelly C. Smither, Clerk
By Bertha Moore, D. C.

The sheriff's return on the foregoing summons is in words and figures as follows:

Executed on John J. Craig, Auditor of Public Accounts for the State of Kentucky, and Charles I. Dawson, Attorney General of the State of Kentucky, by delivering a true copy hereof to each one of them May 12, 1920.

G. Bain Moore, S. F. C.
By N. A. Sullivan, D. S.

On the 12th day of May, 1920, the clerk issued the following temporary restraining order:

S. Rosenbloom & Company, - - - - - - Plaintiffs,

vs. TEMPORARY RESTRAINING ORDER.

E. H. Taylor, Jr. & Sons (Inc.) &c., - -. Defendants.

THE COMMONWEALTH OF KENTUCKY,

To defendants, Charles I. Dawson, Attorney General, and John J. Craig, Auditor of Public Accounts of the State of Kentucky:

You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge, payment of the fifty-cent per gallon license tax on his whiskies described in the petition and stored in bond in the Old Taylor warehouses in Woodford County, Kentucky, and which tax is attempted to be imposed thereon under an act of the General Assembly of Kentucky, approved March 16th, 1920, and from enforcing said act or its penalties by suit or indictment or otherwise, until the further orders of the court.

Witness, KELLY C. SMITHER, Clerk of the Franklin Circuit Court this 12th day of May, 1920.

Kelly C. Smither, C. F. C. C.

The sheriff's return on the foregoing is in words and figures as follows:

Executed on Charles I. Dawson, Attorney General of the State of Kentucky, and John J. Craig, Auditor Public Accounts for the State of Kentucky, by delivering a true copy hereof to each one of them. May 12th, 1920.

G. Bain Moore, S. F. C.
By N. A. Sullivan, D. S.

COMMONWEALTH OF KENTUCKY }
COUNTY OF FRANKLIN } Sct.

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing thirty (30) pages contain a full, true and complete transcript of the record and proceedings to this date, in the case wherein S. Rosenbloom & Co. is plaintiff and E. H. Taylor, Jr. & Sons is defendant. No. 30872, an action lately pending in the aforesaid court as the same appears of record and now on file in my office.

Witness my hand as clerk aforesaid, this 4th day of June, 1920.

Kelly C. Smither,
(SEAL) Clerk Franklin Circuit Court.
Transcript fee $11.35

COMMONWEALTH OF KENTUCKY }
County of Franklin }

I, Robert L. Stout, Judge of the Fourteenth Judicial District of Kentucky, and ex-officio Sole Judge of the Franklin Circuit Court, do hereby certify that Kelly C. Smither, who signed the foregoing certificate, is now, and was at the time of signing the same, Clerk of said Court, duly elected, qualified and sworn; that his said signature is in his own genuine and proper handwriting, and that said certificate and authentication are in due form of law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of said court to be hereunto affixed at Frankfort, Kentucky, this———day of June, 1920.

Judge of Fourteenth Judicial
(SEAL) District of Kentucky.

No. 937.

ORDER—Entered and Filed June 4, 1920, J. W. Menzies, U. S. Clerk, by Chas N. Wiard, D. C.

At a Court held June 4, 1920.

This day came the plaintiff, by counsel, pursuant to notice heretofore given, and moved the Court for an interlocutory injunction in accordance with the prayer of its bill. Thereupon came the defendants and filed a motion to dismiss the bill, for the reason that the same does not state facts sufficient to support a cause of action against them, or any of them; and a further motion to dismiss plaintiff's bill because of lack of equity therein, and because plaintiff has a full, complete and adequate remedy at law; and the defendants entered a further motion to stay proceedings herein, by virtue of a stay having been issued against them in a proceeding pending in the Circuit Court of Franklin County, Kentucky, wherein S. Rosenbloom & Company are plaintiffs and E. H. Taylor, Jr. & Sons, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, are defendants; and the defendants filed with this motion a certified copy of the record of said action pending in the Franklin County Circuit Court.

As this is an action wherein an interlocutory injunction is sought to prevent State officials from enforcing a State taxing statute, the District Judge is required to call to his assistance on said hearing two other Judges, as provided by Section 266 of the Ju-

dicial Code. For this purpose the District Judge has invited to sit with him, for the purpose of hearing the motion for an interlocutory injunction in this case, A. C. Denison, Circuit Judge, and Walter Evans, District Judge, and the hearing is fixed for the 17th day of June, 1920, at 9½ o'clock A. M., at Lexington, Ky.

By agreement of counsel, it is further ordered that the motion be submitted upon brief of counsel, which must be filed in triplicate with the Clerk of the District Court for the Eastern District of Kentucky, on or before the said 17th day of June, 1920.

A. M. J. Cochran, Judge.

We approve the above order.

Chas I. Dawson,

Atty. General, Counsel for Defendants.

June 4, 1920.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES CO., - - - - *Complt.,*

vs.

CHAS. I. DAWSON, ET AL., - - - - - - *Defts.*

Motion for Preliminary Injunction,

Before DENISON, Circuit Judge, EVANS and COCHRAN, District Judges:

Per Curiam

This motion involves the question considered in the recent *Freiberg* case, in the Western District—except the matter of value per gallon, an issue not raised in this case.

As we are all of the opinion that the tax is really a property, and not an excise tax, it is unnecessary to consider the additional grounds now urged for injunction. We file a copy of the opinion in the *Freiberg* case, and adopt it—except for the matter of the confiscatory character of the tax—for the purposes of this case. There should be injunctions and bonds as there provided.

June 17, 1920.

A. C. DENISON,
Circuit Judge,
WALTER EVANS,
A. M. J. COCHRAN,
District Judges.

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, IN EQUITY.

THE J. A. FRIEBERG COMPANY (Incorporated), - - - - - - - *Plaintiff,*

vs.

LOUISVILLE PUBLIC WAREHOUSE COMPANY, JOHN J. CRAIG, AUDITOR, AND CHARLES I. DAWSON, ATTORNEY GENERAL OF KENTUCKY, - - - - - - - *Defendants.*

Motion for preliminary injunction. Before DENISON, Circuit Judge, and EVANS and SATER, District Judges. Decided May 31, 1920.

Section 171 of the Kentucky Constitution provides that taxes "shall be uniform upon all property of the same class subject to taxation." Section 172 says that all property shall be assessed for taxation at its fair cash value. Section 174 directs that all property shall be taxed in proportion to its value,—without prejudice to the right to provide for taxation based on income, licenses or franchises. Section 181 says: "The General Assembly may, by general laws only, provide for the payment of license fees on franchises * * * the various trades, occupations and professions, or a special or excise tax."

Prior to 1917, such license taxes as there were on manufacturing or wholesale dealing in distilled spirits had been by way of an annual tax of a fixed sum. In 1917, in the course of a general revision of the

revenue laws of the state, it was provided by Chapter 5 of the Acts of 1917, that every corporation or person engaged in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in the state, in which such spirits are stored, should, in addition to other taxes, pay a license tax of two cents on every proof gallon liable to Federal tax; that every distiller and every bonded warehouseman should make quarterly reports showing the amount of distilled spirits removed from the warehouse by payment of the Federal tax or transferred under bond during the quarter, and at the time of making the report pay the tax of two cents per gallon. The proceeds of the tax were distributed, twenty per cent to the road fund, thirty per cent to the school fund and fifty per cent to the general fund.

In January, 1920, when the Eighteenth Amendment to the Federal Constitution was declared to take effect, there remained in storage in bonded warehouses, in Kentucky, approximately 50,000,000 gallons of distilled spirits, and there was approximately the same amount (probably somewhat more) in storage in bond in the remainder of the United States.

On March 12, 1920, the Governor approved an act of the General Assembly repealing Chapter 5 of 1917, and substituting a revision of generally similar purport. The first section thereof, as so revised, is as follows:

> "Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other

> species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 directed that every owner of a bonded warehouse should make to the State Auditor a monthly report, on the first of each month, showing the number of proof gallons withdrawn or transferred since the last report. Section 3 directed the warehouseman, at the time of making each monthly report, to pay to the Auditor fifty cents upon each proof gallon which had been removed from the bonded warehouse or transferred under bond out of the state, and further provides:

> "and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 4 required that every distiller pay this license tax upon the product of his manufacture

when removed from his premises, unless then placed in a bonded warehouse; that all distillers shall file a monthly statement with the Auditor showing the amount of spirits so removed and not going into a bonded warehouse, and at the same time pay the specified license tax thereon. Section 5 provides that every person or corporation failing to make reports as directed, and failing to pay the taxes as they become due, shall be guilty of a misdemeanor, and upon conviction be fined not less than $500 nor more than $1,000, and that each day that such taxpayer is in default after the date such report is due "shall be considered and treated as a separate offense." Section 6 gives the proceeds of the tax, sixty-five per cent to the road fund and thirty-five per cent to the general fund. Section 7 declares that the license tax of the statute shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons or corporations engaged in business covered by this Act; and repeals Chapter 5 of 1917. Section 8 recites that, whereas, the business covered and licensed by the Act is not now paying an adequate license tax, and, whereas, liquor in bonded storage is being removed from the bonded warehouses and disposed of without the receipt by the state of adequate license tax, "an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor."

The plaintiff, which is an Ohio corporation, in October, 1916, purchased from the distiller warehouse receipts covering 9,800 proof gallons of whiskey, original gauge, and upon the purchase of these

certificates, became and remained the owner of this whiskey which continued in the distiller's bonded warehouse until January, 1920, when it was transferred to a bonded warehouse operated by the Louisville Public Warehouse Company. Thereby, the plaintiff has had, and it has, such constructive possession of the whiskey as the federal laws contemplate before the federal tax is paid.

In April, 1920, plaintiff desired to have this liquor transferred, under the existing federal regulations which permit such transfer, to another bonded warehouse in the state of Massachusetts, and directed the Louisville Public Warehouse Company to proceed with such transfer, at the same time tendering payment to the Warehouse Company of all storage charges, *ad valorem* taxes, and all other payments attending such transfer and claimed to be proper, excepting the fifty cents license fee under the Act of 1920. The Warehouse Company refused to permit such withdrawal and transfer, for the sole reason that the fifty cent tax had not been paid, and claimed a lien upon the whiskey to secure such payment.

Thereupon, plaintiff filed this bill against the Warehouse Company and against the State Auditor and the State Attorney General, alleging that the Warehouse Company was unlawfully refusing to make the transfer and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the Warehouse Company, and asking that the Warehouse Company be enjoined from further refusing to make the transfer or from further asserting any lien for this fifty cent tax;

that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the Attorney General be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act. A motion for preliminary injunction was made, and the District Judge, proceeding under Sec. 266 of the Judicial Code, caused the motion to be heard before the court as now constituted.

Several questions are involved, and it is not feasible to discuss all of them exhaustively. As to several of them, we state only our conclusions; as to some, we add the reasons which induce the conclusion.

1. *Jurisdiction of this court as a federal court.*

This is clear, first, because the bill shows diverse citizenship with more than $3,000 involved in money values; and, second, because the bill states a case of rights arising under the Fifth Amendment to the Federal Constitution. It is well-settled that, in the latter case, the federal court has jurisdiction if the claim of federal right is made in good faith and is not frivolous, even though in the end it may turn out to be erroneous.

2. *Case arising under Sec. 266, Judicial Code.*

Two state officers are made parties defendant, and an injunction is sought to prevent them from enforcing the law of the state, which law is said to be unconstitutional. The tax law does not seem to impose

upon the auditor any duty of enforcement, nor is it clear that he can do anything which would be harmful enough to call for an advance prohibition. As to the attorney general, the case is different. While this statute does not require him to act, it seems to be understood by all parties, including the attorney general himself, that it is his official duty to enforce the law by bringing, on behalf of the state, all actions and by enforcing all penalties which the law provides for. The bill alleges that he intends to enforce these penalties, and he does not dispute this allegation. The matter has proceeded upon the assumption by the district judge of the district and by all parties, that the case is one contemplated by Sec. 266; and we see no reason to hesitate on this account.

3. *Abatement under Sec. 266.*

By the amendment of March 4th, 1913, it was provided by way of amendment to this section, that proceedings thereunder in any federal court should be stayed pending the determination of the question in the state courts, if

> "a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of the state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court."

The attorney general shows, by way of abatement or stay of the present application, that a suit has been brought by another owner of whiskey, in a situation analogous to that of plaintiff here, against an-

other warehouseman, the purpose of the suit being to compel the delivery of the whiskey to the plaintiff, who had paid the government tax, and against which delivery the warehouseman was urging that it must collect the fifty cent tax under the law now in question. After the defendant had answered and set up this law and claimed that it ought to be entitled to keep the whiskey until the validity of the law was determined by some competent court, the plaintiff in that case filed an amended petition asking an injunction against the state auditor and the state attorney general to prevent them from enforcing this act; thereupon, an injunction issued in that suit enjoining them "from requiring from the plaintiff, or his agent or distiller in charge, payment of the fifty cent per gallon tax * * * until further orders of the court."

We pass by a serious question as to whether this injunction is valid, and, for present purposes, assume that it is. It does not present such a case as is contemplated by the amendment of March 4, 1913, to Sec. 266 of the Judicial Code. This is for two reasons: The first is that the state court which issued this injunction is not the state court contemplated by the amendment. The action of the federal court is to be superseded or suspended only in case—as we read the statute—"a suit to enforce such statute or order shall have been brought in a court of the State having jurisdiction thereof under the laws of such state"; and while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit

to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The attorney general would escape this conclusion by saying that the clause "to enforce such statute or order" is dependent upon and defines the word "court," and not the word "suit." This construction is not only—as it seems to us—awkward and unnatural, but it leaves the word "thereof" superfluous and without meaning, and leaves the word "suit" going at large without definition. According to this construction, if only the suit is brought in a court which has jurisdiction to enforce this law, it makes no difference what kind of a suit or what it is about.

The second reason why the amendment of March 4, 1913, does not apply is that it contemplates a stay which will protect against the enforcement of the law the plaintiff who, in the Federal Court, is seeking the injunction. It is manifest that the stay which only prohibits the attorney general from enforcing the law against another plaintiff in another case, can not protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the Federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House Judiciary Committee, February 27, 1913, Report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but

however that may be, and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court.

Therefore, considering the papers filed by the attorney general on this subject as a plea in abatement, it must be overruled, and considering them as answers to plaintiff's motion for an injunction, they are insufficient.

4. *Jurisdiction of this court as a court of equity.*

Obviously, equity has no jurisdiction, except upon the theory that an injunction is necessary; and an injunction will not be awarded, if there is an adequate remedy at law. The vital question, then, is, "Is there an adequate remedy at law"?; and, to answer this in the affirmative, we must know what that remedy is.

(*a*) It is said that the tax may be paid under protest, and that, if the law turns out to be invalid, it will be the duty of the auditor to make a state warrant for repayment, and that this duty will be enforced by mandamus proceedings. If this remedy were clear and certain, it might be "adequate" (*); but its existence is at least doubtful. As a general rule, payment merely under protest, unless some stat-

*Dow v. Chicago, 11 Wall. 108, 112; Indiana Co. v. Koehne, 188 U. S. 681; Boise Co. v. Boise City, 213 U. S. 276, 282; Singer Co. v. Benedict, 229 U. S. 481, 487.

ute expressly provides, is voluntary payment, and suit for recovery will not lie even if there is a defendant who can be sued. This taxing statute does not provide for payment under protest, and does not provide for suing the state to get the money back, even if payment were made to release a levy and so were compulsory. The existence of this remedy can depend only on Sec. 162 of the Kentucky Statutes.

This section authorizes the refunding warrant in cases where a tax, which was paid, was "not due"; and a later clause makes reference to "the mistaken payment." In a broad sense, taxes which are invalid because the taxing act is unconstitutional, are "not due"; but the Kentucky Court of Appeals has not yet construed the statute as extending to such a case (*). It has been held not to reach cases where the assessment, made by some board or assessing officers, was invalid on account of their violation of law, and this holding has been put upon the ground that the auditor could not review the action of the assessing officers and determine its validity. On the other hand, cases where the question was whether a tax should be paid under one statute or under another or under both, have been held within the scope of the section. It has been at least strongly intimated that plaintiff can not demand this warrant unless he paid the tax under the compulsion of distraint or a right of distraint and under a mistake of law or fact. Taxes paid merely under protest can not be recovered

*German v. Coulter, 112 Ky. 577; Louisville v. Coulter, 112 Ky. 584; Bosworth v. Metropolitan, 162 Ky. 344; Louisville v. Bosworth, 169 Ky. 824; Greene v. Taylor, 184 Ky. 739; Craig v. Security (March 9, 1920).

without express provision of law, since mandamus will lie only to compel performance of a plain duty, and since, to require the Auditor, at his peril to determine the unconstitutionality of a legislative act, is to put upon him an extraordinary burden, we must have grave doubt whether this remedy exists. Certainly, the state of the Kentucky decisions does not justify us in saying it is so clear and effective as to be "adequate," in the sense of the fundamental equity requirement. Further, the remedy is by mandamus, a discretionary writ; the plaintiff is entitled to his adequate remedy in the Federal court (*U. S. Life Ins. Co.* v. *Cable,* C. C. A. 7, 98 Fed. 761), and a Federal court will mandamus a state officer only in clearest case. It seems a paradox that a court should refuse an injunction and thus permit an act to be done, and then issue a mandamus to compel its undoing.

(*b*) Another suggested remedy is that the plaintiff pay the Warehouse Company the tax and immediately sue to recover it back. As to this, it could be answered, first, that a lien given by an unconstitutional law is no lien, and, hence, payment by plaintiff, in order to get possession of his property, would not be compelled by the lien, would be voluntary and suit to recover it back would be defeated for that reason (*). It could be answered, second, that as soon as the first day of the next month arrived and the Warehouse Company did not pay the tax over to the State, penalties would accrue against the ware-

*We assume that, if the law is valid, there is a lien effective against the withdrawing owner, though that is not clear. See infra.

house company at the minimum rate of $500 per day, and the pendency of the law suit would be no defense against those penalties. Further, plaintiff, in case of failure, would be liable, perhaps directly to the State, for the same penalties, and at least liable over to the warehouse company for their amount. Still further, the warehouseman's personal responsibility may be insufficient.

(*c*) The same matter of accruing penalties applies to an action of replevin against the warehouseman, after tender of valid charges and claims—if that action would otherwise be appropriate under the Kentucky practice.

No one of these suggested remedies accompanied by such contingencies is "*adequate*" (*Davis* v. *Wakelee*, 156 U. S. 680, 688; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 1, 12; *Union Pacific Co.* v. *Weld*, 247 U. S. 282, 285).

5. *If the plaintiff is right upon the merits, is there that imminent irreparable injury which alone justifies a preliminary injunction?*

This is, in part, the same question as to whether there is an adequate remedy, but it goes further.

It is not to be doubted that the extravagant and oppressive penalties which accumulate under the law, so that no one could ever refuse payment during the length of time necessary to carry through a test suit, demonstrate irreparable injury under the rule of *Ex parte Young*, 209 U. S. 123, and similar cases, except for two considerations which are said to distinguish,

The first is that this section of the statute imposing these penalties may be considered as separable and, if obnoxious to controlling principles, may be considered as invalid without affecting the rest of the law—whereby a suit for penalties could be defeated. In advance of a decision by the Kentucky courts, we can not be assured that this provision is separable. It is the only effective means which the state has for enforcing the law and collecting the tax. We can not see that the state has any compelling lien. Taxes are not payable until the first of the month after the liquor is withdrawn from the warehouse, and when the liquor is so withdrawn and removed from the state, as the statute contemplates, no effective lien in favor of the state can remain. In those cases where the warehouseman owns the liquor, the purported lien thereon is plainly ineffective in the tax collection. The effect of the statute might be such, if some difficulties of construction are overlooked, as to give the warehouseman a lien and compel the payment of the tax to pay him before he surrenders the liquor to the owner, but this would not help the state any in collecting from the warehouseman; it would have no weapon, except the penalties, and a lien upon the warehouse which might be of little comparative value.

When we compare the Act of 1920 with that of 1917, we find that the earlier one provided that the Auditor should bring suit to collect the tax, with an eight per cent penalty and with all other interest and penalties provided for delinquent taxes in other cases. The revisers omitted these provisions and substituted only the declaration in Sec. 5 that each day of

default shall be a separate offense. The legislative intent to regard this extreme penalty as essential is fairly clear. At least, we cannot presume that the Kentucky Legislature would have regarded this statute as sufficient and effective, without the penalty section, and, in that situation, we cannot pronounce that section separable.

The second distinguishing consideration is that no penalties accrue unless the owner withdraws his liquor, and thus, there is no irreparable injury unless the owner brings it on himself. Ordinarily, a tax becomes due at a fixed date, and thereafter, the penalties against the nonpaying owner accrue in spite of anything he can do. In this case, as we later construe the act, nothing accrues until the owner makes the first move; and, hence, there is superficial force in the consideration urged—but only superficial. It is to say that it is no injury to a property owner to put an intolerable burden upon a certain use by him of his property, because he may, if he will, refrain from that use. This cannot lessen the property-owner's right to complain of the burden, when the effect is upon any rightfully contemplated use of his property; much more must this be true when the effect is upon the only substantial use which he can make of it; and thus we observe another form of the proposition, later discussed, that the withdrawal of whiskey from the warehouse is not a mere privilege.

Plaintiff now desires to ship his whiskey to Massachusetts. He says that he wishes to bottle, to save the heavy "outage" incident to the expected long storage, and that this is not allowed at defendant's

warehouse, but the facilities which he wishes to use are in Massachusetts; to forbid him to make the best rightful use of his property, is, in fact, to deprive him of his property; and it is no answer to say that postponement of the right is his only injury. There is no visible end to the postponement. He can never test the question in any other way than by this case, until he pays the tax and takes the chance of getting it back; every other owner is in the same position; and if each must wait for some other owner to determine the question, the supposed test case can never start. In the meantime, leakage, evaporation, storage charges and regular taxes eat up—or drink up—the property.

We think the injury is correctly to be called irreparable; and it is not only imminent, it is present.

6. *The alleged discrimination against Kentucky holders.*

We do not see that plaintiff is deprived of the equal protection of the laws, merely because those who own and store whiskey in other states may not have to pay this tax or an equivalent one, and, therefore, can take the market away from plaintiff. The Fourteenth Amendment can not insure that each state shall have a taxing system equivalent to that of every other.

Nor are we prepared to say that the statute depends upon a classification, among those who own property in Kentucky, so arbitrary as to be violative of the "equal protection" clause of the Four-

teenth Amendment. We do not understand that to impose an otherwise proper license or excise tax upon a privilege with regard to one class of property has ever been thought unlawfully discriminatory for the sole reason that similar privileges as to other classes of property were not similarly taxed; nor can it be thought that it is merely and wholly arbitrary to put a license privilege as to whiskey in bond in a class by itself.

7. *Is there lack of due process of law?*

This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence, we proceed to the reasons alleged.

8. *Is the entire law invalid because of the excessive penalties?*

The penalties are plainly oppressive—lacking any provision for opportunity to test the law. Giving to plaintiff's property a net value of $1 per gallon ($1.50 less the tax), and taking every day's delay to pay the tax as a separate offense, the property would be exhausted by the minimum penalties before it was time to put in an answer to any test suit. This arbitrary character further appears because the fines for willful refusal to pay on 10,000 gallons *cannot* be more than twice as much as they *must* be for the careless neglect to pay on one gallon. We do not see that they are in substance less objectionable than

those denounced in *Ex parte Young, supra*, see pp. 145-7; and we have already stated our reasons for thinking that the penalty section was inseparable and that the law would not have been passed without it or some substitute for it. Since it is apparent that there arise questions of law and of fact upon which the owner is entitled to have a judicial inquiry, it would seem that this section makes the whole law invalid; but this point is not expressly made in the bill of complaint, though perhaps included within some general terms therein used, it has not been argued by counsel, and we prefer not to rest our decision upon it, but only to refer to it as confirming us in the conclusion later reached.

9. *Had the Kentucky Legislature power to levy such a tax?*

Taxation is of three kinds: upon persons, upon property and upon excises. This is plainly not a capitation tax. The Kentucky Constitution requires that property taxes shall be levied *pro rata* upon all property, and it is conceded that this particular tax can not be sustained as a property tax. That leaves for consideration only excise taxes.

The Kentucky Constitution gives the Legislature power to "provide for license fees on * * * occupations," and this statute declares that it levies an occupation tax. So far as it is levied upon the occupation of manufacturing whiskey, it is within the ordinary definitions and pursuant to the long-settled policy of Kentucky; but so far as it seeks to mark

out a separate and distinct occupation or business, the owning and storing and withdrawing of untax-paid whiskey, it seems to involve a previously unheard of "occupation," and one which, as applied to this subject, is very difficult to distinguish from the occupation of owning property. However, it is unnecessary to rest any conclusion upon a matter of definition. If the statute is a valid exercise of power under any constitutional grant, it ought not to be condemned merely because it adopted a wrong name for itself.

The same clause of the constitution which provides for license taxes for occupations, continues, "or a special or excise tax." There seems no reason to think that the allowable "special" tax was intended to cover a discriminatory property tax or refers to anything which is not fairly to be defined as an excise tax. The ultimate question, therefore, is whether this statute imposes a valid excise tax.

We first meet the problem whether the law intends to impose a tax of fifty cents per gallon per year so long as the business of storing whiskey in bond is continued, or, rather, intends to impose only one fifty cent tax, regardless of the period of storage. In favor of the first view, it is to be noted that the first section expressly declares the tax to be an "annual" one, that, save for changing the definition of the business taxed, the insertion of the word "annual" formed the only change made by the revisers, as compared with Sec. 1 of the Act of 1917, that the Act speaks of "taxes" as though contemplating a plural, and that, although nothing is payable until

withdrawal, it would be possible at that time to compute the tax as having been an annual one accruing year by year up to that date. In favor of the opposite view, it is to be seen that no tax is payable until after a withdrawal or transfer, and that there are express provisions fixing the amount to be paid whenever that time arrives at the sum of fifty cents per gallon.

It may be that these conflicting provisions make the statute so unintelligible that it is invalid for that reason, or it may be that it ought to be construed according to the first view. In either of these events, that would be the end of this controversy, since it is entirely clear, and the Attorney General admits, that an annually accruing tax of this amount would be confiscatory and invalid.

The Attorney General insists that the latter view above specified is the proper one, and says that this is the view which has been and will be taken by the state officers in enforcing the law. Doubtless he can not by his position at this time, bind the Kentucky courts as to their ultimate decision of this question; but, for the further discussion of the matters before us, we assume—without deciding—that he is right and that only one fifty cent tax will ever accrue.

It is no objection to the validity of a tax as an excise that it is payable only upon the happening of an event, or that it is measured by the amount of property which that event affects. This principle is illustrated by *Raydure* v. *Board*, 183 Ky. 84, sustaining the validity of an excise tax upon the output of oil wells.

The objection to this tax goes deeper. It provides, in effect, that the owner of property situate in Kentucky and who has not embarked that property in any business carried on in Kentucky, may not have his property, for sale or use or to carry into some other state, until he has paid a special tax upon it of a half or a third of its value in addition to all other ordinary and regular taxes. When this law was passed and given immediate effect, there were supposed to be 30,000,000 gallons of whiskey in store in bond in the state. Upon this, the owners had paid the regular *ad valorem* tax every year, and had paid or were liable to pay the regular excise tax of two cents per gallon imposed upon the business of manufacture.

Upon the principle can the mere allowing of this property to remain in existence, in the only form in which the Federal laws allowed it to remain, be considered as a privilege which the legislature might make conditional upon the payment of a tax for revenue—which depends upon different principles than does a regulatory or inspection tax under the police power?

It is true that the quality somewhat changes with age, and it is not inconceivable that a revenue excise tax might rightly be imposed upon the business of storing whiskey for aging purposes, in effect as a branch of the manufacturing business; but it would be distorting this law to attribute to it that purpose.

This tax is imposed, not upon the business of storing, but upon the single business of "owning and storing • • • and in removing"; the tax is the

same whether the storage has been for one day or for a period of years; upon the defendants' construction, which we are now assuming; out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping it for future consumption or sale.

We cannot escape the conviction that it was the real purpose of those who drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. It is a property tax in the clothes of an excise. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. Chief Justice MARSHALL said in *Brown* v. *Maryland*, 12 Wheat. 419, 444.

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In reaching this conclusion, we must give great weight to the fact that the formerly existing law placed an excise tax of two cents per gallon upon the entire combination business of manufacturing, with its incidental storing and withdrawing. This was the legislature's idea of a proper excise tax. After

the prohibition amendment and laws had practically stopped the business of manufacturing, and, in common supposition, destroyed the great part of the market for whiskey in bond, the legislature repealed the two cent law and substituted this so-called excise tax of fifty cents, which was to be applied to the mere withdrawal, wholly disconnected from manufacture. If the new tax were to be truly an excise, the circumstances suggested a diminution of the old, rather than an increase of 2500 per cent.

Another special consideration tends to persuade to the same end. An excise or occupation tax, ordinarily, is imposed not merely upon a privilege which the legislature may grant or withhold, but upon a privilege which the prospective taxpayer may accept or decline. Not so here. The owners of whiskey in bond in Kentucky, when this law was passed, could not refuse to engage in the business of storing it in Kentucky, if they did not wish to pay the tax. The law was given immediate effect, to the effect that and in order that they could not decline; like the Ancient Mariner's audience, they "can not choose but" stay; and in substance it was declared that they became, on that day, subject to pay a tax on account of the business which they had already done, but which, if it were a business, had been free from this tax until that moment.

The principles which limit the definition of a permissible excise tax are discussed in the familiar text books and digests, and, among many instances, by Chief Justice FULLER, in *Pollock v. Farmers' Co.*, 157 U. S. 429, 580, *et seq.*, and by Judge O'REAR, for

the Kentucky Court of Appeals, in *Standard Oil Co.* v. *Commonwealth,* 119 Ky. 75, 79-81. The controlling proposition is that the mere right to own and hold property cannot be made the subject of excises. The principle has been applied, for example, to the mere owning of timber (*Thompson* v. *Kreuter,* 112 Miss. 165) and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson* v. *McLeod,* 112 Miss. 383. See the discussion of principles and authorities in these two Mississippi cases). The Corporation Tax Cases (*Zonne* v. *Minneapolis,* 220 U. S. 187, 191; *McCoach* v. *Minnehill,* 228 U. S. 295, 302; *U. S.* v. *Emery,* 237 U. S. 28, 32) are analogous. Plaintiff's acts, like those of the *Emery* corporation, were "limited to the necessary incidents" of ownership. True, in these cases, the court was trying to find the legislative intent in using the phrase "doing business," and here, we are concerned with the legislative power, but we understand that such power, in this case, rests upon being "engaged in business"; and thus the two questions come to be the same.

We do not necessarily decide the question whether the tax might be good as an excise as applied to whiskey made after the law was passed. Since no license tax is distinctly imposed on manufacturing such whiskey as goes into bond, it might be claimed, with more or less force, that the making, storing and withdrawing was one connected business, the license tax burden being pending until it attached upon the culminating act, the withdrawal. Nothing is now involved except whiskey which had been made and had

gone into storage before March 12; and the business or occupation which justifies the excise must be found in what happened since.

10. *Is the tax confiscatory?*

The mere fact than an excise tax, levied under the revenue power, operates practically to prohibit the business taxed, has been held not to make the law invalid when an act of Congress was under consideration (*McCray* v. *U. S.*, 195 U. S. 27, 51), but the power of the Kentucky Legislature under the Kentucky Contitution is more limited.

The Attorney General concedes that a tax which operates to prohibit the conduct of an otherwise lawful business is invalid; the plaintiff contends that this invalidity results when the burden, although not completely prohibitive, is so heavy as to take a large part of the profits of the property.

While some of the Kentucky cases invalidate excise taxes because prohibitive, yet they do not necessarily depend for their result, upon the substantially complete prohibition which existed in those particular cases. Other decisions seem to support the plaintiff's contention.

In *Owen County* v. *Cox*, 132 Ky. 738, it was found that the license tax upon the occupation of operating a four-horse dray was such that the owner "could make little, if anything, more than the amount of the tax." In *Louisville* v. *Pooley*, 136 Ky. 286, the holding was that a license tax which took respectively from 25 to 100 per cent of the net earnings of those

engaged in a business was so far prohibitive as to be beyond the power of the legislature. In *Sallsbury* v. *Equitable Co.*, 177 Ky. 348, a license tax which was found to amount to one-third of the net earnings of the largest business of the class was considered unreasonable, confiscatory and prohibitive. A number of similar cases are reviewed, and an injunction against the tax was sustained.

Many excise taxes that, as against other business, would seem arbitrary and oppressive, have been sustained as against the liquor business because of its character, but these cases have generally if not always involved the exercise of the police power; the present case involves only a tax for revenue. It is further to be noted both that the mere owning of whiskey and the withdrawing of it from bond has not been held to be a business obnoxious to any public policy, and also, that the recent constitutional and statutory prohibitions of intoxicating liquors as a beverage have gone far to remove the burden of public reprobation from that owning and dealing which the law still permits.

It is plaintiff's contention that, since whiskey in bond can be dealt in only through warehouse receipts, the plaintiff if engaged in any business, is engaged in the purchase and sale of these certificates (although not in Kentucky) with the prospect of making, at the best, only a few cents per gallon, and that the imposition of this tax destroys all of the profits which the average dealer in certificates can make. We do not see that plaintiff is in any better position than his vendor, mediate or immediate, who was the manufacturer, would have been, and the real ques-

tion is whether one who had manufactured whiskey and who had it on hand in bond when this law was passed, can complain of the tax as confiscatory.

Considerable proof has been taken by both parties as to the value of whiskey in bond, in order to show what fraction of that value has been taken by the tax. In finding the facts upon that subject which rightfully bear upon this motion, we should give the benefit of reasonable doubts to the state, since the unconstitutionality of the act should clearly appear before there can be an injunction; nor can we consider as controlling the peculiar values which special brands may have on account of special reputation, nor treat the plaintiff in this case any better or any worse than the average of his class; because, with such a question, his peculiar hardships will not avail him nor will his special lack of equity sustain the law. Defendant has proved tending to show that some sales to the retailer of tax paid whiskey are being made at a figure which seems to leave two dollars per gallon for the in bond owner, and that, after deducting cost and expenses and this fifty cent tax, there will be a good profit to the manufacturer. We think these instances are rather exceptional and the computation of costs omits important items. The market price, the regular selling price, of warehouse receipts is the true criterion, because in no other way is whiskey in bond bought and sold.

Plaintiff claims this value is not more than one dollar. Defendant claims it to be a dollar and a half.

The facts seem to be that, early in 1920, the general price throughout the country was somewhat less

than one dollar; that the imposition of this Kentucky tax tended to depress the price of that stored in Kentucky and to advance that stored elsewhere; that market conditions at about the time of and since the passage of the act, have also tended to increase the price; and that the present market price of certificates for whiskey in bond, in Kentucky, is about one dollar, and that of certificates for storage elsewhere about one dollar and a half. It is obviously true that if the fifty cent tax were paid by all holders of Kentucky storage, they could not add that amount to their price, because the same act would double the quantity available for the market and depress the price.

We think it can fairly be assumed that within a short period after the act was passed and when it began to take substantial effect, whiskies in bond, in Kentucky, as a class, would have been worth about $1.25, if it were not for this law, and that the tax, therefore, should be considered as taking about forty per cent of that value, and a very large part, if not all, of the normal profits of the manufacturing and storing business (*).

We have said that this tax was not discriminatory merely because whiskey outside of Kentucky is not reached; but this situation has a bearing on the question whether the tax is so oppressive as to be prohibitive under the Kentucky rule. When the federal government imposes an excise tax on whiskey, it operates alike upon the manufacturers and owners

*On the question of value, it is not irrelevant that a state board, charged with the duty of assessing at the true value for **ad valorem** taxation, values whiskey in bond at fifty cents per gallon.

throughout the country; all can add the tax to their price, and no manufacturer suffers save from the indirect result of a possibly less consumption. It is otherwise, when a forty per cent tax is laid upon the manufacturers of one state only and their market is a national market. If they add the tax to their selling price, they are out of business, so far as competitive standards control.

In view of these facts, and the Kentucky decisions, we believe this tax to be so prohibitive as to be in violation of the Kentucky constitution.

11. Our conclusion that the tax is invalid is subject to review. No action ought to be permitted by either party, which would make that review unavailable. We think the practical way to prevent the injury to plaintiff arising from perhaps a long suspension of his right to take and have his property free from unlawful burden, and yet to preserve the tax to the state if it shall eventually be found valid, is to provide that the injunction which will permit the plaintiff to take his property out of the state without paying the tax shall be conditional upon the giving of a bond by him. The bond will run to the Commonwealth of Kentucky; it will be in the penalty of $8,000, approximately double the amount of the tax; it will be subject to approval, both as to form and as to sufficiency of surety or sureties, by the clerk of this court, after notice to the Attorney General of the application for approval; it will be filed with the clerk and be retained by him until it shall hereafter be ordered by the court either to be cancelled or to be delivered to the Commonwealth for suit; and it will

be conditioned that the plaintiff pay, or cause to be paid, a tax of fifty cents upon each proof gallon taken, or caused to be removed, under protection of the injunction, without payment of the tax—such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

12. We are informed that other owners of warehouse receipts, situated similarly to plaintiff, desire to, and will, bring similar suits. We think it proper that each such owner should be allowed to intervene in this suit, if plaintiff does not object, or, lacking intervention, that each such suit should be consolidated with this for the general purposes of hearing and tried. It is clear that the right of each intervenor or plaintiff to an injunction will be the same as the right of the plaintiff here, unless by reason of some special circumstance. We think the substance and the spirit of Sec. 266 have been met by the hearing which has now been had upon this subject before the court of three judges convened under that section, and that it is not necessary to have a further hearing before such special court upon each application for injunction made by any such intervenor or other plaintiff. We therefore approve the issue of preliminary injunction by the District Judge to any such intervenor or plaintiff whose case appears to such District Judge not to be essentially distinguishable from that of this plaintiff, such injunction to be upon the same terms and conditions as prescribed herein.

13. What we have said disposes of the motion

for injunction and of the matters urged merely in opposition. The defendant Warehouse Company and the defendants Auditor and Attorney General have filed motions to dismiss. If these were to be granted, they would result in a final decree. We think the court, as now constituted, has no jurisdiction to make a final decree, but is called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. Of course, if we have no power to sustain the motions to dismiss, we have no power to deny them. Accordingly, they will stand for hearing before the District Judge in the due course of procedure.

We are aware that upon appeals from orders made under Sec. 266, the Supreme Court has not noticed the distinction between the power to decide the motion for injunction and to make final disposition of the cause, but we know of no express or necessarily implied ruling on the subject. There are some practical reasons for thinking that the court, thus constituted, ought to retain jurisdiction of the whole case until the end; but we cannot find this power in the statute.

A. C. Denison,
Circuit Judge,
Walter Evans,
J. E. Sater,
District Judges.

May 31, 1920.

IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES WAREHOUSE COMPANY, - - - - - - - - *Plaintiff,*

vs. **Judgment Granting Temporary Injunction.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - - - *Defendants.*

At a Court held June 17, 1920.

This case coming on to be heard upon the Plaintiff's motion for a temporary injunction, upon its verified Bill in Equity herein, before the Hon. A. C. Dennison, Circuit Judge, Hon. Walter Evans, District Judge, and Hon. A. M. J. Cochran, District Judge, pursuant to Section 226 of the Judicial Code, and the cause having been argued by Counsel and the Court being advised and memorandum opinion having been rendered and filed herein, it is thereupon ordered, considered and adjudged as follows, to-wit:

(1) That until the further order of the Court, the defendant, John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, desist and refrain from demanding in any manner the report or reports required by the Act of the General Assembly of the Commonwealth of Kentucky of March 12, 1920 (except to the extent that such reports may be made by virtue of the stipulation filed herein) upon the removal from bond or transfer in bond of such whis-

key contemplated by said Act, and from asserting against such whiskey or the property of plaintiff in Kentucky, on account of such removal or transfer, any lien under said act; and the defendants Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky, and each of them, desist and refrain from instituting any action or proceeding in Equity or at law, or procuring any indictment or warrant to coerce the payment by the plaintiff of the tax specified in said Act, upon the distilled spirits known as whiskey, stored in the bonded warehouses of the plaintiff, or upon any of the plaintiff's warehouses or property, or to enforce in any manner against the plaintiff, any penalty or fine prescribed in said Act.

(2) That writs of temporary injunction shall issue accordingly.

(3) That the taking effect of this order of injunction and the issuance of such writ of injunction, be upon the condition precedent, that the plaintiff file with the Clerk of this Court, a bond to the Commonwealth of Kentucky, in an amount equal to one and one-fourth (1¼) times the amount of the tax due from the plaintiff, at the time such bond or any additional bond may be given, to be approved as to form and as to sufficiency of the surety or security, by the Clerk of this Court (or in accordance with any stipulation made between the parties hereto), and to be retained by said Clerk until it shall thereafter be ordered by the Court, either to be cancelled or to be

delivered to the Commonwealth for suit, and to be conditioned that the plaintiff pay or cause to be paid, a tax of fifty cents upon each proof gallon of distilled spirits taken or caused to be taken or removed under the protection of the injunction in this case, without payment of the tax, such payment to be made if and when it shall be finally decided in this case that the tax is valid and should have been paid, or if and when this case shall finally fail or be dismissed for any reason.

(4) That during the time that the temporary injunction herein shall continue in force, the plaintiff shall within the first fifteen days of each calendar month hereafter, execute a bond similar to the one originally executed to secure the payment of the tax upon so much distilled spirits as shall have been withdrawn from bond or transfer under bond out of the State, during the preceding calendar month.

This clause of this decree may be superseded by any stipulation agreed between the parties and filed of record in the case.

A. C. Denison,
Circuit Judge.
Walter Evans,
A. M. J. Cochran,
District Judges.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs. **Petition for Appeal.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - - - - *Defendants.*

To the Honorable, the Judge of the District Court of the United States, for the Eastern District of Kentucky.

The defendants, Charles I. Dawson, Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Fourteenth Judicial District of the State of Kentucky, and John J. Craig, Auditor of Public Accounts of the State of Kentucky, respectfully represent to the Court that they are, and that each of them is, aggrieved by the decree entered in this case on June 17, 1920, for the reasons set forth in the Assignment of Errors hereto attached.

WHEREFORE plaintiff prays for an appeal to the Supreme Court of the United States to the end that said decree may be reviewed, and if found erroneous, reversed.

CHARLES I. DAWSON,
Attorney General of the State of Kentucky,
Counsel for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs. **Assignment of Errors.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - - - - *Defendants.*

The defendants, Charles I. Dawson, Attorney General, etc., Victor A. Bradley, Commonwealth's Attorney, etc., and John J. Craig, Auditor, etc., file this, their Assignment of Errors, to-wit:

1. The Court erred in granting an interlocutory injunction herein.

2. The Court erred in holding that the Act of the General Assembly of the State of Kentucky, approved March 12, 1920, was unconstitutional, and especially in holding,

(*a*) That the said Act of March 12, 1920, was void because of the excessive penalties imposed for the violation thereof;

(*b*) That the said Act of March 12, 1920, imposed not a license or excise tax, but a property tax;

3. The Court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State Court.

4. The Court erred in holding

(*a*) That the plaintiff had no adequate remedy at law; and

(*b*) That imminent, irreparable injury was threatened, which justified the issuance of an interlocutory injunction.

5. The Court erred in refusing to sustain the defendant's motion to dismiss the Bill in Equity.

CHAS. I. DAWSON,
Attorney General of Kentucky,
Counsel for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

In Equity, No. 937.

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, - - - - - - *Plaintiff,*

vs. **Bond on Appeal.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - *Defendants.*

KNOW ALL MEN BY THESE PRESENTS, that we, Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) as principals, and W. T. Fowler as surety, are held and firmly bound unto the Kentucky

Distilleries & Warehouse Company in the sum of Five Hundred ($500) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 22d day of June, 1920.

WHEREAS the above-named Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the district court for the Eastern District of Kentucky, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHAS. I. DAWSON,
VICTOR A. BRADLEY,
JNO. J. CRAIG,
W. T. FOWLER.

STATE OF KENTUCKY, }
COUNTY OF FRANKLIN. } ss.

On the 22d day of June, 1920, personally appeared before me Charles I. Dawson (Attorney General of the State of Kentucky), Victor A. Bradley (Commonwealth's Attorney for the Fourteenth Judicial District of Kentucky) and John J. Craig (Auditor of Public Accounts) and W. T. Fowler, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Charles I. Dawson (Attorney General of the State of Kentucky) and John J. Craig (Auditor of Public Accounts) and W. T. Fowler being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Franklin and that he is worth the sum of $1,000.00 over and above his just debts and legal liability and property exempt from execution.

CHAS. I. DAWSON,
VICTOR A. BRADLEY,
JNO. J. CRAIG,
W. T. FOWLER.

Subscribed and sworn to before me this 22d day of June, 1920.

My commission expires May 20, 1924.

ADDIE BRUMFIELD,
Notary Public, Franklin County,
Kentucky.

(Seal)

The within bond is approved both as to sufficiency and form this 23d day of June, 1920.

A. M. J. COCHRAN,
Judge District Court U. S. for Eastern Dist. of Ky.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs. **Order Granting Appeal.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - - - - *Defendants.*

At a Court held on June 23, 1920.

This day came the defendants by counsel and presented their Assignment of Errors, Appeal Bond, and Petition for Appeal, praying for an appeal to the Supreme Court of the United States, from the decree entered herein June 17, 1920, granting an interlocutory injunction, and it is thereupon ordered that the Appeal Bond be, and the same hereby is approved; that the Assignment of Errors, Appeal Bond and Petition for Appeal be, and the same hereby are filed, and that the appeal to the Supreme Court of the United States be, and the same hereby is granted.

A. M. J. COCHRAN,

June 23, 1920. *Judge.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

KENTUCKY DISTILLERIES WAREHOUSE COMPANY, - - - - - - - - - *Plaintiff,*

vs. **Stipulation.**

CHARLES I. DAWSON, ATTORNEY GENERAL, ETC., - - - - - - - - - *Defendants.*

IT IS STIPULATED between the plaintiff and the defendants, as follows, to-wit:

1. That on the appeal to review the final decree entered June 17, 1920 herein, the following papers and no others shall constitute the entire Transcript of Record on such appeal.

(*a*) Bill in Equity.
(*b*) Motion for an Interlocutory Injunction.
(*c*) Motions to Dismiss.
(*d*) Motion for stay of proceedings.
(*e*) Transcript of record in State Court suit filed with defendants' motion for a stay of proceedings.
(*f*) Order entered June 4, 1920.
(*g*) Per curiam opinion filed June 17, 1920.
(*h*) Opinion in *J. & A. Freiburg Co.* v. *Louisville Public Warehouse Co., etc.*
(*i*) Decree granting temporary injunction entered June 17, 1920.
(*j*) Petition for Appeal.

(*k*) Appeal Bond.
(*l*) Assignment of Errors.
(*m*) This Stipulation.
(*n*) Clerk's Certificate.

2. That the issuance and service of citation is hereby waived, and the appearance of the plaintiff is hereby entered in the Supreme Court of the United States.

WM. MARSHALL BULLITT,
Counsel for Plaintiff,
CHAS. I. DAWSON,
Counsel for Defendants.

DISTRICT OF KENTUCKY—ss.

I, JOHN W. MENZIES, Clerk of the District Court of the United States for the Eastern District of Kentucky at Frankfort, do hereby certify that the foregoing 94 pages contain a true and correct transcript of all the portions of the record to be copied in the case mentioned in the caption hereof, in accordance with the stipulation of counsel on file and copied therein as the same appears from the record and files in my said office.

WITNESS my hand and seal of said Court this the——— day of July, A. D. 1920.

JOHN W. MENZIES, Clerk,
By———————, D. C.